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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 709

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and JOHN S. GORSUCH and ALBERT J. DOIG, *Petitioners*

vs.

ANGUS J. DE PENTO, HJALMAR B. LANDOL, FRANCIS I. SABO, EDWIN B. PEGRAM and ELMER W. DUHAME, *Respondents*

Brief of Respondent Elmer W. Duhame in Opposition to Petition for Writ of Certiorari

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vs.

ANGELO J. DE PINTO, HULMAN B. LANGLOIS, FRANCIS L. SAIA, EDWIN K. PLORAN and ELMER W. DUHAMEL, *Respondents*.

Brief of Respondent Elmer W. Duhamel in Opposition to Petition for Writ of Certiorari

Comes now the Respondent, Elmer W. Duhamel, and presents this brief in opposition to the Petition for Writ of Certiorari filed herein by the Petitioners, Provident Security Life Insurance Company and John S. Gorsuch and Albert J. Doig.

QUESTIONS PRESENTED FOR REVIEW

Petitioners' statement of the first question presented for review is substantially correct. Under the Seventh

Amendment, is the defendant in a stockholder's derivative action entitled to a trial by jury with respect to any claim made on behalf of the corporation which is cognizable in an action at common law? It is our position, however, that this action, in its present posture, is not a stockholder's derivative action.

We disagree with Petitioners' statement as to the second question presented for review. Petitioners take the position that the Court of Appeals held that the District Court was without power to enter a Judgment N.O.V. for plaintiff pursuant to Civil Rule 50(b), irrespective of whether or not there were genuine issues as to material facts. On the contrary, the Court based its decision upon the recognition that the amount of damages was disputed.

STATEMENT OF THE CASE

Petitioners' statement of the case creates the inference that the evidence conclusively established Respondent Duhame's liability and the amount of damages. We do not deem it appropriate at this juncture to burden the Court with a resume of the evidence. With respect to the question of this Respondent's liability, we deem it sufficient to point out that he was not present at the meeting at which the assets were transfered and thus did not take part in the alleged transfer. The damages sustained by United as a result of the transfer of assets to American cannot be measured by the value of such assets. United received in exchange for such assets, 20,000 shares of the capital stock of American. (R. 340) Upon the transfer of such assets to Kelly, Ameri-

can acquired 38,799.89 shares (approximately 38.79%) of the capital stock of United. These shares were subsequently cancelled when United merged with Provident. (323 F.2d 838, Note 31)

ARGUMENT

I. The Seventh Amendment Preserves to the Defendant in a Stockholder's Derivative Action the Right to Trial by Jury with Respect to Any Claim Made on Behalf of the Corporation Which Is Cognizable in an Action at Common Law.

Petitioners concede that had this action been instituted by United against Respondent he would have been entitled to a jury trial. The claim of the corporation is for damages resulting from the alleged negligence of Respondent. Petitioners contend, however, that because the action was commenced by a stockholder, Respondent was—by this circumstance—deprived of his right to a jury trial. Petitioners present a very narrow and rigid argument: A stockholder's derivative action is a suit in equity. Jury trials are unknown to equity. The Seventh Amendment preserves the right of trial by jury only in suits at common law. The right to trial by jury has not been expanded or restricted by the Federal Rules of Civil Procedure. Ergo, a defendant does not have a right to trial by jury in a stockholder's derivative action. The vice in Petitioners' line of reasoning lies in the assumption that a court of equity—in the face of defendant's insistence upon his rights under the Seventh Amendment—may enforce the legal rights of the corporation without a jury trial.

As early as 1915, this Court, in *Fleitmann v. Welsbach Street Lighting Company*, 240 U.S. 27, affirmed the dismissal of a bill of equity instituted by a stockholder on behalf of Consolidated Street Lighting Company for the purpose of compelling the defendants to pay to the company three

fold damages under the Sherman Act. This Court pointed out that when a penalty of triple damages is sought to be inflicted, the Sherman Act should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. Justice Holmes, speaking for the Court, stated:

> "Of course, the claim set up is that of the corporation alone, and if the corporation were proceeding directly under the statute no one can doubt that its only remedy would be at law. Therefore, the inquiry at once arises why the defendants' right to a jury trial should be taken away because the present plaintiff cannot persuade the only party having a cause of action to sue. * * *"

It is true that under the specific provisions of the Sherman Act, a claim for triple damages can only be enforced by jury trial. It would appear, however, from the language of Justice Holmes that there was no intention to draw a distinction between the right to jury trial granted or preserved by statute as compared with the right to jury trial granted by the common law and preserved by the Seventh Amendment.

In 1952 the United States Court of Appeals (2nd Cir.) in *Fanchon & Marco, Inc. v. Paramount Pictures*, 202 F.2d 731, decided that Fleitmann was not an insurmountable obstacle to the maintenance of a stockholder's derivative action under the antitrust laws. The Court stated:

> "* * * But the issue of treble damages may perhaps cause confusion hereafter, as its premonition has already caused upset below. So we shall discuss it briefly. The only case directly in point is the Fleitmann case; the other cited hold merely that a derivative action could not be brought 'at law' under the then procedure. The Fleitmann case does hold specifically

that a party is entitled to a verdict of the jury against him before he can be forced to pay treble damages under 15 U.S.C.A. § 15. This perfectly reasonable view of the policy of the statutory remedy can be enforced without any difficulty in the merged procedure of the present rules. The two major issues of right of the shareholder to sue and of violation of the antitrust laws causing damage to the corporation can be tried side by side or otherwise as may be convenient; that one may go to the jury while the other does not causes no difficulty. United States v. Yellow Cab Co., 340 U.S. 543, 555, 556, 71 S.Ct. 399, 95 L.Ed. 523; Bruckman v. Holizer, 9 Cir., 152 F.2d 730; Ring v. Spina, supra. The Fleitmann case of course requires that if treble damages are to be assessed, they must be on a verdict by a jury unless that has been waived by both parties as provided in F.R. 38, 39. There is nothing in the Fleitmann case to hold more; and we do not believe sound policy consistent with greater restriction on the right to treble damages. See 53 Col. L. Rev. 1069, 1071; 61 Yale L.J. 1019; 1020, 1021, 1055, 1062. In fact Justice Holmes left open the case of a bill in equity for 'a decree directing the corporation to sue, or, if it fails to do so, permitting the plaintiff to sue in its name and on its behalf.' 240 U.S. at page 29, 36 S.Ct. 234, 60 L.Ed. 505, which in substance is what this procedure amounts to under the wider scope of action now permissible."

Fanchon & Marco does not pretend to say that the Federal Rules of Civil Procedure have expanded the right to trial by jury. It was recognized that under the old procedure a court of equity could have disposed of the jury trial problem by entering a decree directing the corporation to sue or, if it failed to do so, permitting the plaintiff to sue in its name and on its behalf on the common law side of the court. This juggling from one side of the court to the other

is obviated by the merger of law and equity under the Rules of Civil Procedure.

In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, this Court held that:

> "Only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."

In *Thermo-Stitch, Inc. v. Chemi-Chord Processing Corp.* (5 Cir.) 294 F.2d 486, the scope of *Beacon Theatres* was considered. The Court stated:

> "The mere presence of an equitable cause furnishes no justification for depriving a party to a legal action of his right to a jury trial.
>
> It is therefore immaterial that the case at bar contains a stronger basis for equitable relief than was present in Beacon Theatres. It would make no difference if the equitable cause clearly out-weighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of Beacon Theatres, as we construe it."

Minnesota Mutual Life Insurance Co. v. Brodish (D.C., E.D.Pa.) 240 F. Supp. 777, involved an action to declare two life insurance policies void because of fraudulent misrepresentations, wherein the defendant filed a counterclaim seeking recovery of the face amount of the policies. In deciding that the defendant was entitled to a jury trial, the Court stated:

> "The issue of fraudulent misrepresentation is decisive of the issue in both the plaintiff's suit and the counterclaim. For if the insured was guilty of fraudulent misrepresentation, the beneficiary cannot recover. This

issue it is the defendant's right under the Seventh Amendment to have decided by a jury. Even were this a purely equitable proceeding, and not a statutory declaratory judgment action, the Beacon doctrine tells us that the longest footed chancellor may not cross the line established by the Seventh Amendment."

The 5th Circuit's interpretation of *Beacon Theatres* in *Thermo-Stitch, Inc.* is tacitly recognized by this Court in *Dairy Queen v. Wood*, 369 U.S. 469. See Note 8 on page 473. Among other things, this Court stated:

"The holding in Beacon Theatres was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the federal rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such 'imperative circumstances', Beacon Theatres requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury."

In *Rogers v. American Can Company* (3 Cir.) 305 F.2d 297, the Court recognized that "under the broad concept of Federal Rule of Civil Procedure 2" there are no procedural problems which inhibit the maintenance of a stockholder's derivative action. The availability of a jury trial of the legal issues was deemed to be supported by *Fanchon & Marco* and demanded by *Dairy Queen*.

Assuming that this action was originally a stockholder's derivative action in equity, it must now be treated as a pure legal action. As a result of the first appeal, a remand was

ordered "to provide an opportunity for Provident to join, or be joined in this lawsuit". (295 F.2d 908, 914) After the remand, Provident asked to be substituted as party plaintiff. (R. 1473) The District Court granted this request (R. 1490) and thereafter decided to "realign" Provident as a party defendant. (R. 1708) Such "realignment" was meaningless. The real party in interest is Provident. Provident's participation in this action was not produced by the exercise of the equitable powers of the District Court. Provident voluntarily elected to enforce as plaintiff a legal remedy which devolved upon it as successor to United. Although this may once have been a derivative action instituted by Gorsuch, it is not now and never was a derivative action commenced by Doig. It is now a common-law action prosecuted by the plaintiff, Provident. If this case is retried, there is not one equitable issue to be considered.

After Provident entered the case as plaintiff, Respondent moved that judgment be entered in his favor on the verdicts rendered on March 18, 1960. In the alternative, Respondent, pursuant to Rule 38 of the Federal Rules of Civil Procedure, demanded a trial by jury of all of the issues involved herein. (R. 1630) The District Court rejected Respondent's request. (R. 1708) Under the circumstances, it cannot be rationally argued that the District Court did not deprive Respondent of his right to a jury trial as preserved by the Seventh Amendment to the Constitution of the United States.

If the granting or denial of a Writ of Certiorari with respect to this question is to be determined by reference to Rule 19 of this Court, we respectfully submit that the Writ must be denied. The decision of the Court of Appeals for the Ninth Circuit in this case is not in conflict with the decision of another Court of Appeals on the same matter.

nor has it decided a federal question in a way in conflict with the applicable decisions of this Court. To the contrary, the opinion of the Court of Appeals is wholly consistent with, and in fact demanded by, the decisions of this Court.

II. Civil Rule 50(b) Does Not Permit a District Court to Enter Judgment N.O.V. Where the Evidence Creates a Factual Issue as to Defendants' Liability or the Amount of Damages.

Petitioners attempt to find a question for review by this Court where one does not exist. It is conceded that where, in a jury trial, a party has made a motion for a directed verdict at the close of all the evidence and the same is denied the Court may, upon timely motion by such party, enter Judgment N.O.V.; provided, of course, that the moving party is entitled to judgment as a matter of law. In ruling on the motion, the trial court must, of course, view the evidence in the light most favorable to the party against whom the motion is made. *Continental Ore Company v. Union Carbide Corporation*, 370 U.S. 690.

In the case at bar, the Court of Appeals recognized that the amount of damages was in dispute. Predicated upon such conclusion, it held "that the trial court was without power to enlarge the jury awards against Sabo, Pegram and Landoe or to make an award against DePinto and Duhame who had escaped any jury award". The Court went on to say in a footnote: "It is therefore unnecessary to consider whether the trial court also erred in finding Appellants DePinto and Duhame liable, the jury having found neither of them liable". As we point out hereinabove, the evidence with respect to the amount of damage is not only in conflict, but will not, from any view thereof, support a judgment in the amount entered by the trial judge.

Petitioners, more or less parenthetically, argue that the Court of Appeals should have reviewed the evidence for the

purpose of determining whether or not the trial court erred in concluding that there was no genuine issue of fact as to defendant's liability, to the end that the case might be sent back for a retrial as to the issue of damages only. Petitioners cite Civil Rule 59 and *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494. Petitioners do not suggest that Rule 59 constitutes a mandate for such action and the case which is cited militates against a partial retrial in an action of this kind.

We respectfully submit that there is no question for review by this Court with respect to the interpretation or application of Civil Rule 50(b) by the Court of Appeals, except as pointed out in our Cross Petition.

CONCLUSION

In the light of Rule 19 of this Court, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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